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SOL (MSHA) v. ATLAS MINERALS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEST 83-87-M A.C. No. 42-01164-05501
v.	Docket No. WEST 83-105-M A.C. No. 42-01164-05502 (Consolidated)
ATLAS MINERALS, RESPONDENT	
ALLEN YOUNG, INTERVENOR	Calliham Mine

DECISION

Appearances: James H. Barkley, Esq., Robert J. Lesnick, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John A. Snow, Esq., and James A. Holtkamp, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Respondent;
Allen E. Young, Dove Creek, Colorado, Intervenor, pro se.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), arose as a result of an inspection of respondent's uranium mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

After notice to the parties, a hearing on the merits commenced in Moab, Utah, on June 19, 1984.

The Secretary and the respondent filed post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Format of the Decision

The decision initially considers issues involving the alleged exposure to radon daughters. The radon exposure citations are considered in numerical order. Thereafter, an alleged posting violation is reviewed.

Citation 2084505

This citation alleges a violation of 30 C.F.R. 57.5-46, which provides:

> 57.5-46 Mandatory. Where radon daughter concentrations exceed 10 WL, respirator protection against radon gas shall be provided in addition to protection against radon daughters. Protection against radon gas shall be provided by supplied air devices or by face masks containing absorbent material capable of removing both the radon and its daughters.

Citation 2084506

This citation alleges a violation of 30 C.F.R. 57.5-38, which provides:

> 57.5-38 Mandatory. No person shall be permitted to receive an exposure in excess of 4 WLM in any calendar year.

Citation 2084507

This citation alleges a violation of 30 C.F.R. 57.5-37, which provides as follows:

> Underground Only
> 57.5-37 Mandatory. (a) In all mines at least one sample shall be taken in exhaust mine air by a competent person to determine if concentrations of radon daughters are present. Sampling shall be done using suggested equipment and procedures described in section 14.3 of ANSI N13.8-1973 entitled "American National Standard Radiation Protection in Uranium Mines," approved July 18, 1973, pages 13-15, by the American National Standards Institute, Inc., which is incorporated by reference and made a part of the standard or equivalent procedures and equipment acceptable to the Administrator, Metal and Nonmetal Mine Safety and Health, Mine Safety and Health Administration. This publication may be examined at any Metal and Nonmetal Mine Safety and Health Subdistrict

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Office of the Mine Safety and Health Administration, or may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018,
The mine operator may request that the required exhaust mine air sampling be done by the Mine Safety and Health Administration. If concentrations of radon daughters in excess of 0.1 WL are found in an exhaust air sample, thereafter:
(1) Where uranium is mined-radon daughter concentrations representative of worker's breathing zone shall be determined at least every two weeks at random times in all active working areas such as stopes, drift headings, travelways, haulageways, shops, stations, lunchrooms, magazines, and any other place or location where persons work, travel, or congregate. However, if concentrations of radon daughters are found in excess of 0.3 WL in an active working area, radon daughter concentrations thereafter shall be determined weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.
(2) Where uranium is not mined-when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annually thereafter. If concentrations of radon daughters are found in excess of 0.3 WL in an active working area radon daughter concentrations thereafter shall be determined at least weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.
(b) If concentrations of radon daughters less than 0.1 WL are found in an exhaust mine air sample, thereafter:
(1) Where uranium is mined-at least one sample shall be taken in the exhaust mine air monthly.
(2) Where uranium is not mined-no further exhaust mine air sampling is required.
(c) The sample date, locations, and results obtained under (a) and (b) above shall be recorded and retained at the mine site or nearest mine office for at least two (2) years and shall be made available for inspection by the Secretary or his authorized representative.

Citation 2084508

This citation alleges a violation of 30 C.F.R. 57.5-34, which provides:

> 57.5-34 Mandatory. (a) Auxiliary fans installed and used to ventilate the active workings of the mine shall be operated continuously while persons are underground in the active workings, except for scheduled production-cycle shutdowns or planned or scheduled fan maintenance or fan adjustments where air quality is maintained in compliance with the applicable standards of Section 57.5, and all persons underground in the affected areas are advised in advance of such scheduled or planned fan shutdowns, maintenance, or adjustments. (b) In the event of auxiliary fan failure due to malfunction, accident, power failure, or other such unplanned or unscheduled event;
>
> > (1) The air quality in the affected active workings shall be tested at least within 2-hours of the discovery of the fan failure, and at least every 4-hours thereafter by a competent person for compliance with the requirements of the applicable standards of section 57.5 until normal ventilation is restored, or
> > (2) All persons, except those working on the fan, shall be withdrawn, the ventilation shall be restored to normal and the air quality in the affected active workings shall be tested by a competent person to assure that the air quality meets the requirements of the standards in Section 57.5, before any other persons are permitted to enter the affected active workings.

Citation 2084509

This citation alleges a violation of 30 C.F.R. 57.5-45, which provides:

> 57.5-45 Mandatory. Inactive workings, in which radon daughter concentrations are above 1.0 WL, shall be posted against unauthorized entry and designated by signs indicating them as areas in which approved respirators shall be worn.

Citation 2084510

This citation alleges a violation of 30 C.F.R. 57.5-44, which provides:

> 57.5-44 Mandatory. The wearing of respirators approved for protection against radon daughters shall be required in environments exceeding 1.0 WL and respirator use shall be in compliance with standard 57.5-5.

Citation 2084511

This citation alleges a violation of 30 C.F.R. 57.5-39, which provides:

> 57.5-39 Mandatory. Except as provided by standard 57.5-5, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 WL in active workings.

Citation 2084513

This citation alleges a violation of 30 C.F.R. 57.5-40.

Respondent's motion to withdraw its notice of contest as to this citation was granted (Tr. 449). Accordingly, the citation and the proposed penalty of $20 should be affirmed.

Stipulation

At the hearing the parties stipulated as follows:

1. The COMFO II respirator is not the correct respirator to be worn in an exposure of 80 work levels (Tr. 260).

2. The radon sample sheets received in evidence are complete for those mines covered by such exhibits (Tr. 411).

3. The radon and the time/area cards received in evidence for miners Young, McCleary, Flynn, Wells, Stengel, Riley and Yates are complete (Tr. 411).

Summary of the Evidence

Evidence on behalf of the Secretary of Labor

The Secretary's witnesses were Royal W. Crowson, Wade Cooper, Thomas Richards, Dennis Wells, Allen Young and Jess McCleary.

The evidence shows that radon, a gas, results from the natural sequential decay of uranium. The daughters of radon, particulates, are a decay product of the gas (Tr. 170). Daughters become particulates as the radon gas decays (Tr. 204).

The working level (hereafter at times referred to as WL) is a unit measuring a concentration of radon daughters. A working level hour of exposure is calculated by multiplying the concentration (as established by an air pump sample) by the number of

hours a miner is exposed to a concentration (Tr. 171). The exposure, which progresses arithmetically, can also be calculated as a WL week. In order to calculate a WL week you sum all of the WL hours for a given workweek.

A WL month, under current MSHA regulations, equals 173 WL hours (Tr. 171, 172). Four WL months constitute the allowable annual exposure to radon daughters (Tr. 172). A WL year is the sum of all WL hours in a calendar year (Tr. 171-172). Recommended cumulative lifetime exposure is limited to 120 WL months (4 WL months x 30 years) (Tr. 172). If a miner works 40 hours a week for 52 weeks for 30 years, he can be exposed to .33 WLs (4 WL months divided by 12 months equals .33) (Tr. 173).

Radon gas and its daughters are controlled by ventilation. Borehole fans are the primary method of diluting the daughters and reducing the radon gas decay time (Tr. 173, 174). Borehole fans move air through the mine, whereas auxiliary fans distribute the air within the mine (Tr. 174, 175).

If exposed to radon gas, protection can be provided by a miner using either a self-contained breathing apparatus or a Scott respirator with an attached absorbic chemical cannister (Tr. 175; Ex. P27). These are the only two types of respirators capable of furnishing protection against the gas and its daughters (Tr. 181). Only the canister type (Ex. P27) and the self-contained apparatus are approved for exposures above 10 WL.

Royal J. Crowson served as the Atlas radon technician during the period in issue here. His duties included sampling and recording the exposure levels of the radon daughters (Tr. 75-77). The daughters are sampled by drawing air, for five minutes, with an MSA portable air pump. The resulting readout shows, in work levels, the radiation concentration in the area sampled (Tr. 77, 78, 92).

After ascertaining the concentration Crowson would routinely record it. He retains one copy and posts the other copy in the office of the area he has sampled (Tr. 78-80; Ex. P19, P23).

Crowson's normal procedure is to give copies of the sampling to the supervisors in the engineering department and he also enters the detail on a summary sheet. The original goes into a permanent company file (Tr. 80; Ex. P9).

Crowson would generally, but not always, sample weekly. At times he would carry a reading forward from the previous week's recording. Crowson would then take the concentrations in specific areas and calculate the miners' exposures. Their exposures were based on the time (as reflected by their radon cards) they were in a given area (Tr. 81, 82).

The summary sheets have a column to record a "mine average." Some of the averages relate to an entire mine. Other averages relate to certain areas in a mine (Tr. 83). When Crowson assigns a figure to an entire mine, that number is entered on the summary sheet (Tr. 83; Ex. P9). The averages are also entered on the miners' individual radon cards (Tr. 83, 84).

Before Crowson enters the exposure on the card, the miner has already entered on the same card the number of hours he has spent in a given area. So the technician simply multiples those hours by the exposure in that area. The final figure is the total exposure for each week (Tr. 83-85). For example, if a miner worked two hours for five days in the Calliham mine, the technician would simply multiply ten hours by the Calliham mine average (Tr. 84, 85).

The weekly exposures would then be entered monthly. This cumulative record would be the total exposure as expressed in work level months (WLM) (Tr. 85).

In determining what areas should be sampled Crowson would talk to the workers and foremen to determine where the work was being done (Tr. 90, 91). Crowson recalls testing when the concentration was at 1 WL (one work level) (Tr. 89). All miners must be withdrawn from an area where the exposure reaches 1 WL (Tr. 89-90).

Allen Young and Jess McCleary, both Atlas supervisors, avoided a general company layoff in January 1982. At that time these men were placed on standby status which involved mostly performing general maintenance work (Tr. 266-268). In late May or June they began salvage operations by starting at the Patti Ann, and encompassing the Sage, Calliham, Dunn and Rim mines. Salvage is basically the removal of anything that could be reused. The order of equipment removal was usually the power substations followed by the power lines, then the fans, the pumps and finally the pipe sections (Tr. 268-270). The pipe would be removed from the furthest point and they would work up the incline (Tr. 269). Yates, an immediate supervisor, instructed the men to remove fans before other equipment (Tr. 270-271). Yates was aware when the fans were removed and he knew the order in which the material was being salvaged (Tr. 272). Yates would usually haul the salvage fans to the company office in his pickup (Tr. 272, 273). Neither Yates, nor anyone else at the mine, told the men to keep the fans in operation until the other work was completed (Tr. 273). On every occasion the electricians disconnected the fans before Young and McCleary entered the work areas (Tr. 274).

The company had taken Young's log book. Without the book he wouldn't know the exact date when the power was disconnected

(Tr. 274). In Young's opinion the removal of the fans in advance of the other equipment was an unreasonable practice (Tr. 273, 274).

(The evidence of alleged overexposure to radon daughters focuses on different weeks. The decision reviews these incidents in chronological order.)

For the week ending January 16, 1982, Young was in the East Haulage area one hour each day for a WL exposure of 14.35. This indicates a concentration of 2.87 WL (Tr. 433; Ex. P10-2).

For the week ending (Footnote.1) January 22, 1982, and particularly on January 19, 1982, of that week the radon daughter sample for the east haulage area of the Calliham mine showed an exposure of 2.87 WL (Tr. 110, 113; Ex. P19).

Young's radon card for the same area shows he worked one hour each day in a concentration (Footnote.2) of .15 WL. McCleary's card shows a concentration of .12 WL (Ex. P10-3; P11-2). Crowson agreed the men should have been removed from the 2.87 WL concentration. Crowson didn't know the miners' cards were so drastically understated but it related to a borehole fan shutdown. The timecards on their face show the mine was in compliance with the radon standards (Tr. 116). Crowson resampled the next day with fans on (Footnote.3) (Tr. 115-118).

For the week ending March 20, 1982, Jess McCleary worked at the Rim mine for two hours for a total exposure of 2.62 WL hours. This indicates an exposure of 1.31 WL (Tr. 438; P11-12-13).

McCleary also worked at the Sage mine for the week ending March 27, 1982, for four hours for an exposure of 4.28 WL hours, or in a radon exposure of 1.07 (Tr. 439; Ex. P11-13). In addition, McCleary worked in Section 10 for eight hours that week for a total exposure of 32.56 WL hours. This would indicate a

radon daughter exposure of 4.07 WL (Tr. 439; Ex. P 11-13). From January through April 1982, Atlas had not told McCleary he was to wear a respirator when exposures were above 1 WL. Further, he was not provided with nor was he required to wear a canister type respirator any time in the first four months of 1982 (Tr. 439, 440).

Young testified that he worked in the Sage mine for three days during the week ending March 27, 1982 (Tr. 434, 425; Ex. P10-15). For that week the Sage showed a radon concentration of 4.28. Section 10, a drift in the Sage, showed a concentration of 32.56 (Tr. 426, 427). There were no signs requiring that respirators be worn before a miner entered the Sage. Further, there were no signs posted in the Sage mine warning against radon daughters during March or April. The only signs in the area related to safety glasses, moving vehicles, etc. (Tr. 428-429).

Crowson testified that during the week of May 22, 1982 three Atlas electricians spent time in an emergency escape drift in the Pandora mine (Tr. 94, 95). The radon concentration was "pretty high" at 80 WL. Crowson notified his supervisors and suggested in a handwritten memo that potentially high exposure areas should be sampled more frequently (Tr. 95, 97; Ex. P24). Crowson was concerned particularly in view of the upcoming shutdown which would involve a disruption of ventilation (Tr. 95, 96; Ex. P24).

Electrician Wells confirmed that he learned of his exposure when he returned to the Atlas office. Crowson questioned the number of hours on Wells' radon card. Wells reduced his recorded hours to two from three and one-half. Wells stated at the hearing that a more accurate figure for his time underground was at at least three hours (Tr. 231-233). Crowson testified that none of the electricians had a canister type respirator that day. Wells had worn a COMFO respirator (Tr. 234-236).

On September 1, 1982 Crowson sampled North 700 West, a work heading in the Calliham mine. The radon daughter concentration was quite high, at 48.63 WL. Young and McCleary were removing pipe from the area at the time. They were wearing COMFO II respirators. Such respirators are not effective above 10 WL (Tr. 100-102). Crowson wrote a memo to management indicating the auxiliary fan was not ventilating the heading (Tr. 103, 104). Crowson did not know the extent of this exposure until he had left the mine and placed the sample in his counter (Tr. 105). Crowson advised a supervisor of this abnormally high concentration. He further stated that the men should be kept out of the area (Tr. 106-109). Crowson's written report went to supervisors Clements, Wilson and Dye (Tr. 109).

Young recalled the occasion when he was exposed to 48 WL. There was no ventilation (Tr. 279, 283-288). Young and McCleary first became aware of the exposure when they saw the radon daughter sample sheet in the Calliham mine office (Tr. 287, 288; Ex. P19-23). The two men had worked about four hours in this high exposure (Tr. 288, 289). Neither Yates, who knew the exposure, nor anyone else, told the two men not to re-enter the mine. Nor were they told to get appropriate respirator protection (Tr. 288-290). In fact, Young and McCleary re-entered the mine and remained underground for an hour (Tr. 290).

Young was aware that the yearly maximum WL hours permitted are 692. This knowledge apparently led to two meetings with management in mid-September, 1982. Young saw the Atlas record indicating that for the month of July 1982 his exposure to radon daughters was 345.21 WL hours (Tr. 344; Ex. P8). This figure seemed unusually high, so he discussed it with Clements, the general line foreman (Tr. 345, 346). Young said the hours were "climbing fast". But Clements, who was not overly concerned, said not to worry about it. Further, Yates didn't seem alarmed (Tr. 347).

The following day there was a meeting with Torres, Clements, Axtell, Yates and McCleary. Crowson was in and out of the meeting. At the meeting the group reviewed the radon cards for Young and McCleary from January 1st until the meeting. Torres did most of the talking. Management representatives questioned if the time cards correctly recorded the actual time the men were in a particular location in the mine (Tr. 348-350). Torres persisted in his request that Young change the cards. Young did so but there was no pressure or threats by management to make any changes (Tr. 301, 350). Some, but not all, cards were marked as "revised". Four cards were changed and were not marked as revised. Twenty of Young's 54 time cards were revised (Tr. 351-353; Ex. P10). In all instances the unrevised cards were more accurate than the revisions (Tr. 368).

Young, in a prior interview to MSHA's representative Ben Johnson, made some conflicting statements as to the accuracy of the original radon cards as compared with the revised cards (Tr. 369-380).

Health Hazards

Victor E. Archer, M.D., an expert witness, testified extensively on the medical effects of radiation exposure to underground uranium miners (Tr. 579-587). He was familiar with the citations in the pending cases (Tr. 588).

The hazards to the exposed miners include cancer of the lung, diffuse lung injury and skin cancer. The risk, in general, varies directly with the magnitude of the exposure (Tr. 590, 591).

Dr. Archer indicated that the risk of lung cancer to uranium miners increases almost directly to their exposure to radon daughters. Uranium miners who do not smoke have lung cancer seven times that of their counterparts in the general population (Tr. 593, 594, 596). The basic injury occurs at the time of exposure but the cancer may take years to appear (Tr. 598).

Dr. Archer was on a committee that recommended the 4 WL months as a standard in U.S. mines (Tr. 595, 596). In the doctor's opinion the 4 WL months should be reduced to 2 WL months (Tr. 600-601).

Dr. Archer, under contract with NIOSH, authored Exhibit P38. This extensive document contains a summary of all data relating to the health hazards caused by radon daughters (Tr. 602-603).

Dr. Archer's opinion focuses on the premise that a specific number of lung cancers will appear in a number of miners. But he agreed that no one could tell whether a particular miner in that group would, in fact, get lung cancer (Tr. 606, 607).

Respondent's Evidence

Respondent's witnesses included Richard E. Blubaugh, the Atlas manager for regulatory affairs. Mr. Blubaugh indicated that his duties, as of mid-January 1982, involved responsibility for regulatory compliance (Tr. 479-483).

His duties included supervision of monitoring exposures to radon by sampling work areas on a representative basis and assigning concentrations to miners on the basis of the time spent in those areas (Tr. 484). The samples would be taken only when there was prior notification from a supervisor (Tr. 484).

In May 1982, Blubaugh learned that Young and McCleary, experienced supervisors, were going from standby duties to salvage work. Blubaugh reviewed the company's procedures and concluded the work areas would be monitored before the miners entered the areas (Tr. 485-487). Blubaugh does not consider it prudent to permit men to work in an area where ventilation had been shut down (Tr. 486-487).

In May 1982, such procedures were not followed and a radon overexposure occurred to three electricians in the Pandora mine. The radon technician had not received prior notice that the men were to be in the area (Tr. 489). The radon technician showed Blubaugh his comments concerning that incident (Tr. 488, 489; Ex. P24). Blubaugh met with the company's chief engineer and they agreed to improve communications before there was any change in ventilation (Tr. 490).

Witness Blubaugh was aware that some radon cards had been revised after the exposure to Young and McCleary that occurred September 14 (Tr. 492). Blubaugh's only involvement was to direct that if changes were made, all new cards were to be marked as "revised." The original cards were not to be changed (Tr. 493).

Blubaugh had occasion to review the Atlas records. In August 1982, they reflected that the exposures to Young and McCleary were on the rise. Blubaugh discussed this with Crowson. He affirmed the need to watch the hours closely (Tr. 497, 498; Ex. P8).

Blubaugh does not dispute that miners were exposed to a concentration in excess of 10 WL in the Rim mine on July 1, 1982 and in the Calliham mine on September 1, 1982 (Tr. 504). Further, there was no dispute that miners were exposed to 48.6 WL and near 80 WL in the Pandora mine in May 1982. In addition, there is no dispute that Young and McCleary were exposed in excess of 4 WL months in the calendar year of 1982 (Tr. 505-507; Ex. P31, P32). It is also true that the WLs exceeded .3 and weekly measurements were not taken (Tr. 508, 511).

The concentration at the Calliham mine on September 1, 1982 exceeded 48 WL because the auxiliary fan was not operating (Tr. 511). Blubaugh cannot dispute Young's statement that the fan was inoperable (Tr. 514). Further, the witness does not dispute that the WL exposure exceeded 1 for Young and McCleary (Tr. 515).

The Atlas safety manual for the mill and the company policy manual for supervisors does not refer to radiation control (Tr. 521, 522; Ex. P35).

Crowson reported overexposures to Blubaugh. He reported levels if it was a serious concentration, such as a 80 WL or the 48.63 WL (Tr. 529, 535, 536).

If ventilation is turned off, the radon concentration would be affected (Tr. 538). The Yates work order requested that the fans be turned off on August 9th (Tr. 543). Blubaugh did not know about the work order but he knew salvage operations were proceeding (Tr. 543).

Dale Edwards, the radiation safety coordinator at the mill and a subordinate of Blubaugh, advised Young and McCleary of their overexposure and he told them to get out of the mine (Tr. 558, 559, 578).

In the months of July through September 1982, all portions of the mines that were in production were monitored at least once

a week. In the salvage area the miners were to notify the radon technician so he could monitor the area before they entered (Tr. 560).

Edwards reviewed the company procedures; in his opinion they were both good and adequate (Tr. 561, 562, 566). After July 1982, Edwards noticed the levels were higher than normal for Young and McCleary. He told Crowson to notify them (Tr. 565). Edwards, who was inexperienced in ventilation, did not know that the salvage activities included removal of the ventilation (Tr. 569, 572, 573).

When Edwards was put in charge of testing for salvage in July he was not advised of Crowson's memorandum in May relating to the 80 WL exposure (Tr. 574, 577).

Nick Torres learned that Young and McCleary had been overexposed in September 1982. Torres wanted to verify the overexposure. In checking the radon cards he found three or four cards were arithmetically incorrect. In addition, at a later meeting Young and McCleary agreed that there was room for changes. Young objected to changing cards. He felt that if he agreed to the change it would mean he was not working his eight hours (Tr. 618-624; Ex. P11; P11-52; P10-1 through P10-55). Torres would write in the correct time they were underground if the men agreed. Some changes were made on the original cards. Later they started using new cards marking them as "revised" cards (Tr. 622). After the corrections and revisions the two miners were still overexposed (Tr. 620). From the information we received Atlas believed the timecards were now accurate (Tr. 633).

In the salvage operations the underground fans were taken out first. This is not a reasonable nor a prudent way to conduct such activities (Tr. 627-632).

Discussion

Citation 2084505

The regulation allegedly violated, 57.5-46, requires that miners be protected against radon gas and its daughters. When the concentration of radon daughters exceeds 10 WL, a supplied air device or a filter type respirator must be used.

At the hearing three different types of respirators were introduced into evidence. The DUSTFOE respirator (Ex. P25) is used to filter dust and mist (Tr. 178, 179). The COMFO II respirator (Ex. P26) is approved to filter radon daughters, but not radon gas. It can be used in areas containing up to 10 WL (Tr. 179-181). A SCOTT respirator filters both radon gas and

radon daughters (Tr. 180-181; Ex. P27). A self-contained, air supplied breathing apparatus, approved for radon gas and its daughters, was also discussed at the hearing (Tr. 182).

The Secretary's citation alleges that the standard was violated in the Pandora mine in May 1982; in the Rim mine on July 1, 1982; and in the Calliham mine on September 1, 1982.

The evidence reflects that on May 17, 1982 Wells and two other electricians were exposed to 80 WL in the Pandora mine (Tr. 230). Wells wore a COMFO II respirator which is not the correct equipment for such an environment (Tr. 234, 260). Wells had never seen a supplied air respirator and none of the electricians had a canister type filter respirator (Tr. 236).

Respondent's post-trial brief asserts that before May 17, 1982 the radon level in the Pandora was below 1 WL (Tr. 148, 149; Ex. P23). Respondent asserts that the apparent cause for the high level of radon on May 17 was the result of exhaust air from the adjacent Union Carbide Snowball mine. This condition was further complicated because of a nonfunctioning fan in the Pandora mine. After the fan was turned on, a new reading showed a radon level of 5.0 WL (Ex. P22-1). Respondent's approach is that since there was no evidence the fan was not operating, it cannot be concluded that the miners were exposed to a radon level above 10.

I reject this argument. Clear proof that the three electricians were exposed to 80 WL lies in the radon measurements taken by Crowson, the Atlas technician. His findings were clearly supported by his handwritten message to management (Tr. 94-96; Ex. P24). The lack of an operating fan would not exonerate respondent but only compound its negligence.

The portion of the citation relating to the 80 WL exposure in the Pandora mine in May 1982, should be affirmed.

The Secretary's citation further alleges that Young and McCleary were exposed to concentrations of 11.1 and 16.5 in the Rim mine on July 1, 1982.

Witness Young identified his radon card for the week ending July 3, 1982 (Tr. 275; Ex. P10-34). The card, received in evidence, shows Young was in the Rim mine on Thursday (July 1) of that week. The radon daughter concentration, which would have been recorded by Crowson, was 13.81 (Ex. P10-34). Jess McCleary's radon card placed him in the same posture on the same day (Ex. P11-30).

Respondent's post-trial brief asserts there is no evidence as to the radon levels on July 1 in the Rim mine. The argument evolves in this fashion: the 16.5 WL reading (as per Ex. P22-14)

was not obtained in the Rim but in the "Columbus haulage" area, a separate but connected mine. Respondent then cites the radon cards to show that the citation should be dismissed because Young and McCleary were not in the "Columbus haulage" area on July 1.

Respondent's argument is without merit. As a threshold matter the radon daughter sample sheet (Ex. P22-14) is a sampling for July 7, not July 1. Young and McCleary were obviously in the Rim on July 1, 1982 and they were exposed to a WL of 13.81. Their timecards so reflect (Ex. P10-34; P11-52).

It is true that the exposure was 13.81 and not 16.5 as alleged in the citation. But the issue is whether the miners were exposed to an environment above 10 WL. They were, and a violation of the regulation has been established. This portion of the citation should be affirmed.

Respondent's brief raises issues involving the assessment of a civil penalty as a result of the events of September 1. But "as to the alleged violation of the subject standard at the Calliham on September 1, Atlas acknowledges that the Secretary has shown a violation." (Brief, page 5).

For the foregoing reasons Citation 2084505 should be affirmed.

Unwarrantable Failure

In these citations the Secretary claims that the violation was a result of the unwarrantable failure of the respondent to comply with the regulation.

The Secretary asserts that special findings of unwarrantability associated with the citation is not properly before the Commission in a civil penalty proceeding. I disagree. In a recent penalty case the Commission did, in fact, consider evidence of unwarrantability. Kitt Energy Corporation, 6 FMSHRC 1596 (July 1984).

The existing case law is that an unwarrantable failure to comply may be proved by a showing that a violative condition, or practice, was not corrected or remedied prior to the issuance of the citation because of indifference, willful intent, or a serious lack of reasonable care, United States Steel Corporation, 6 FMSHRC 1423, 1436 (June 1984).

As a defense Atlas asserts that because of the previous regular low level readings in these areas the company had no reason to know that high levels of radon exposure would exist.

The evidence here establishes that in the salvage operation the ventilation fans were the first things removed from the work areas. Atlas knew that radon daughters are controlled by such ventilation. Further, all agreed such removal was a poor work

practice. These factors establish that an indifference and a serious lack of reasonable care by Atlas. In short, affirmative actions by Atlas caused this condition to occur. Blubaugh, the person in charge of compliance, did not consider it prudent to permit men to work in an area where ventilation had been shut down (Tr. 486-487). In addition, the Atlas "procedures" of notifying the radon technician before the men went into a given area were more illusory than real.

In respect to the overexposure to Young and McCleary on September 1, Atlas argues that the two were experienced miners who knowingly and willfully exposed themselves to an unventilated area with the resulting high levels of radon exposure.

Respondent's argument in effect seeks to shift the burden of compliance to the miners rather than itself. The Mine Safety Act is contrary to this view and the argument is rejected. In sum, the events culminating in these violations were the results of affirmative acts by respondent which brought about the violative exposures. For these reasons the citation should be affirmed due to the unwarrantable failure of respondent to comply.

Citation 2084506

The standard in contest here prohibits an exposure in excess of 4 WLM in any calendar year.

Correspondence to Young and McCleary from Atlas establishes the violation (Ex. P31, P32).

In its post-trial brief Atlas raises issues relating to a civil penalty but "admits the existence of a violation of the subject standard" (Brief, page 17).

Atlas disputes the allegations of unwarrantable failure in connection with this citation (Brief, page 28).

The citation here is an accumulation of radon exposures. The analysis, as previously stated in connection with unwarrantable failure, applies here. The allegation of unwarrantable failure is affirmed.

Citation 2084507

The Secretary's citation alleges that radon daughter samples were not taken in active work areas containing radon daughter concentrations above .30 WLs.

In support of his case the Secretary's brief cites the admission by witness Blubaugh relating to this citation (Tr. 508).

I do not find such proof to be persuasive. Such evidence is, at best, a "belief" of the witness (Tr. 508, 509). Accordingly, it is necessary to review the evidence in detail. The Secretary's citation recites that the sampling shortfall occurred during the salvage operations and not during ore production.

The evidence relating to the various mines is fully set forth in the charts contained in Appendix A attached to this decision.

The threshold questions for determination, as urged by respondent, are whether the areas sampled were "active working areas" and whether the standard requires weekly sampling in inactive mines if concentrations are found in excess of .3 WL.

The Secretary's regulations, 30 C.F.R. 57.2, define "active workings" to mean "areas at, in, or around a mine or plant where men work or travel." It is uncontroverted that Young and McCleary were engaged in salvage operations in the mines. It follows that when they were engaged in those activities they were in an active working area of the mine.

A review of the evidence as detailed in Appendix A establishes the following violations.

Sage Mine

Respondent found the Sage mine was above .30 WL on March 31, 1982, but the company did not resample until May 17 and again on June 14. In the intervening time Young was in the mine during the weeks ending April 3, 10, 17; May 29; June 5 and 12. McCleary was also present the same weeks except for the week ending May 29. In the period when there was no sampling, Young and McCleary respectively spent 42 and 41 hours in this environment.

It follows that respondent's argument that the miners were in the Sage on a sporadic basis lacks merit.

Rim Mine

Respondent sampled the Rim mine on March 11, 1982. The next sampling was not until March 26, 1982. Young and McCleary were both present in the intervening time. Respondent's records establish this violation since 30 C.F.R. 57.5-37 requires at least "weekly" sampling in these circumstances.

Patti Ann and Small Fry Mines

Respondent sampled these mines on May 21 when the atmosphere was above .30 WL. Young and McCleary spent a total of 62 hours in these mines before the next sampling on June 17. Additional violations of this standard occurred after the sampling of June 21.

Calliham Mine

While the sampling was more frequent here, violations nevertheless occurred. Atlas sampled the mine on January 19 and learned it was above .30 WL. But they did not thereafter sample for five consecutive weeks as required by the regulations. Violations were repeated when the sampling on February 12th was again above .30 WL.

This citation as to the Sage, Rim, Patti Ann and Small Fry, and Calliham mines should be affirmed.

Citation 2084508

This citation alleges respondent violated 30 C.F.R. 57.5-34 by causing its employees to be exposed to a radon daughter concentration of 48.63 WLs on September 1, 1982 in the N700-440W area of the Calliham mine.

The events concerning this exposure are enumerated in the summary of the evidence. I find witness Young to be generally credible and the uncontroverted evidence establishes a violation of the regulation.

Respondent's post-trial brief asserts it has no evidence to refute Young's claim that the fan was not operating. The Atlas brief further states "there was a violation" (Brief, page 37).

On the record the foregoing citation should be affirmed.

Unwarrantable Failure

Respondent contends that a finding of unwarrantable failure in connection with this citation is not justified. I agree. The high radon exposures of September 1 were due to an inoperative fan. There was no affirmative act by respondent that caused this violation. In addition, there is no evidence that respondent knew the fan was inoperative before the miners entered in the area.

The facts fail to establish that this violation was due to the unwarrantable failure of respondent to comply. The allegations of unwarrantable failure should, accordingly, be stricken.

Citation 2084509

This citation alleges that areas of the Sage mine where the concentration was above 1.0 WL were not posted against unauthorized entry and designated as a respirator area until after the salvageable material had been removed.

Unless Young and McCleary happened to see the radon readings they would have no way of knowing the concentration in a given

area of the Sage mine. As previously noted Young and McCleary worked in parts of the Sage generally in January through April 1982. Respondent during this time knew of the following high readings in the Sage:

Section 10 Drift	4.07	on March 24, 1982
Incline	1.07	same
Section 10 Drift	4.08	on March 31, 1982

(Ex. P20)

Yet the Sage was not posted to warn Young and McCleary. Young worked in the Sage on these specific dates:

Date	Location	No. Hours	Ex. No.
March 22	Sage	2	P10-16
	Section 10	2	
March 23	Sage	1	P10-16
	Section 10	3	
March 25	Sage	1	P10-16
	Section 10	3	
March 29	Sage	1	P10-17
	Section 10	3	
March 30	Sage	1	P10-17
	Section 10	4	
March 31	Sage	1	P10-17
	Section 10	4	
April 1	Sage	1	P10-17
	Section 10	4	
April 2	Sage	1	P10-17
	Section 10	1	
April 5	Sage	2	P10-18
April 12	Sage	1	P10-19 P10-20
May 27	Sage	1	P10-28

McCleary's work activities in the Sage basically parallel those of Young, his partner.

The violation occurred here since respondent knew of the high work level and failed to post the area. Respondent also

knew Young and McCleary would be entering the area in the course of their duties.

Respondent argues that the Secretary hinges some of his citations on certain areas being "active workings" and now, it is argued, the Secretary seeks to have it "both ways". Atlas asserts that salvage operations render a mine an "active working" or it does not.

Respondent apparently believes that an "inactive working", which is not otherwise defined in the regulations, is the mirror image of an "active working", as defined in 57.2.

It is not. The radiation section of the Secretary's regulations contain elaborate directives as to when and where radiation measurements are to be taken. The scope of these regulations indicate that radon daughters are to be measured under essentially all circumstances and conditions in a uranium mine such as this one. For example, 57.5-37 requires measurements at least every two weeks at random times in all active working areas such as stopes, etc., and all other places where persons work, travel or congregate. (Emphasis added). No persons were in this area until Young and McCleary performed their salvage work. On the record this area was factually less than an "active working" but more than an "abandoned working" as defined in 57.2.

Since the radon concentration was above 1.0 WL and since the area was not abandoned, nor posted, the regulation was violated.

Citation 2084509 should be affirmed.

Citation 2084510

This citation alleges Young and McCleary were not issued respirators nor trained for their use in work areas above 1 WL.

It is further alleged that the miners were so exposed (above 1 WL) on the following occasions:

Mine	Week Ending	Working Level
Calliham	January 16, 1982	2.87 (Tr. 433)
Rim	March 20, 1982	1.06 (Tr. 433, 434)
Sage	March 27, 1982	1.07 and 4.07 (Tr. 434, 435)

As a threshold matter Young and McCleary testified they were not furnished protective respirators (such as is photographed in Exhibit P26) during the months of January through April 1982 (Tr. 435, 439-440).

The secondary issues are whether any miners were exposed above 1 WL on the occasions alleged in the citation. I find they were so exposed.

During the week ending January 16, 1982 Young spent one hour each day in the east haulage of the Calliham mine for a total of 14.35 WL. This would result in a radon concentration of 2.87 (Tr. 433; Ex. P10-2).

During the week ending March 20, 1982 Young's revised radon card shows he had been exposed in the Rim mine for four hours to a concentration of 5.24. Mathematically, this would result in an exposure of 1.06 WL (Tr. 433; Ex. P10-14). McCleary's testimony and timecard for the same week in the Rim mine also indicates a WL exposure of 1.31 (Tr. 438; Ex. P11-12).

During the week ending March 27, 1982 Young worked in the Sage for four hours in a concentration of 4.28. This would indicate a exposure of 1.07 WL hours. During the same week Young was in Section 10 of the Rim mine for eight hours in a concentration of 32.56. This would indicate an exposure of 4.07 WL hours (Tr. 434, 435; Ex. P10-16). McCleary's activities parallel those of Young (Tr. 438, 439; Ex. P11-13). The Secretary's post-trial brief (page 15) also cites the exposures to electricians Wells, Flynn and Stubblefield. But this incident, recited in the summary of the evidence, was not alleged to be a violation in the citation. Accordingly, it is not necessary to explore that facet of the evidence.

Concerning the initial incident: Respondent contends that at the time of the monitoring on January 19 the fans in the Calliham were off to allow the water lines to thaw (Ex. P19-1). When the fans were turned on again on January 20 the reading was .03 WL (Ex. P19-2). Since the Secretary failed to establish that the fans were off it is argued the radon level could as easily have been .03 WL.

I am not persuaded. Respondent cannot impeach its own records which show the radon exposures to its miners. In addition, respondent's record keeping does not reflect any effort to overestimate the radon exposure to the miners. The incident involving the week ending January 16, 1982 should be affirmed.

Concerning the incident in the week ending March 20 in the Rim mine: Respondent contends that the Rim was monitored on March 11 and again on March 26. Since the readings range from .02 WL to 2.44 WL (depending on the operation of the fan) and since the radon cards of Young and McCleary do not identify the specific locations in which they worked, it is argued that the Secretary failed to prove that a violation occurred. I agree.

~803

The radon daughter sample exhibit, an Atlas record, amply illustrates respondent's argument. The exhibit reads as follows:

Radon Daughter Samples

Mine Rim Shaft — Date March 11, 1982
/s/ Roy C.

Location	Time	Zone	W.L.	
Shaft Sta. area	9:45		5.23	The borehole fan was
Shaft work area	9:56		4.68	not in operation when these two samples were taken. No one working during time of
				during time of sampling.
Shaft work area	10:48		0.04	Fan turned on at 10:15
Shaft station	10:56		1.74	

The following samples were taken by MSHA inspector Ken Joslin on the same day as the above samples.

Shaft work area	11:25	0.02
Back pump area	11:45	2.33
Shaft sta. pump area	12:03	2.44

Action Taken & Other Remarks

Company personnel who visit the Rim will be given the average of the last five samples which is 1.31 WL.

Exhibit P22-2

Analysis of the Evidence

Witnesses Young and McCleary indicated they worked in the Rim mine during the week ending March 20 (Tr. 433, 438). But they did not identify their specific work area. In addition, the radon exposure shown on the radon cards is, in fact, the mine average of 1.31 WL.

The standard, 30 C.F.R. 57.5-39, does not deal in mine "averages". Proof of where the miners worked in the Rim during that week was pivitol to the Secretary's proof. This portion of the citation concerning the week ending March 20, 1982 should be vacated.

Concerning the week ending March 27, 1982: respondent asserts that the Secretary merely proved that the work level in the Sage mine exceeded 1 on March 24 (Wednesday on the radon cards) but it is alleged there is no proof that the two miners worked in that atmosphere on that date "as alleged in the citation."

I am not persuaded. The citation alleges, in part, exposures "in the Sage mine during the week ending March 27, 1982. March 24 was on Wednesday during that week. On that date two measurements were taken in the Sage. The Section 10 drift showed a 4.07 WL (Ex. 20-2). Young and McCleary were in the Sage mine the following day, March 21.

The events concerning the radon exposures during the week ending March 27, 1982 establish a violation of the regulation. This portion of the citation should be affirmed.

Citation 2084511

This citation alleges miners were exposed to air containing concentrations of radon daughters exceeding 1.0 WL as follows:

Mine	Date	Alleged Exposure
Calliham	January 19, 1982	1.5 WL
	August 5, 1982	1.2 WL
	August 19, 1982	1.7 WL
	September 1,1982	48.6 WL
Patti Ann	June 17-18, 1982	2.7
	June 21, 1982	2.4

It is alleged the foregoing exposures constituted a violation of 30 C.F.R. 57.5-39.

In order to arrive at a conclusion concerning these allegations it is necessary to review and evaluate the timecards and the radon sampling sheets. As a general premise Young testified that he, McCleary, Flynn and Wells worked in the Calliham and Patti Ann on the dates in issue (Tr. 444-446).

Tuesday, January 19, 1982: Young and McCleary each worked one hour in east haulage on this date. At 1:26 the exposure in east haulage was measured at 2.87 WL (Ex. P10-3, P11-2, P19).

Thursday, August 5, 1982: Young and McCleary each worked five hours in the east haulage of the Calliham. On the same date, at 9:30 and 9:36, measurements indicated radon concentrations of 1.05 WL in the "E Haul by 1990" and .13 WL in the "E Haul" (P10-43, P11-38, P19-20).

Thursday, August 19, 1982: On this date Young and McCleary each worked five hours in the west haulage of the Calliham. On that date seven measures were taken. At 9:52 the "W Haulage" was sampled at .01 WL and the notation appears of "removing pipe". On August 19 the "west" average was assigned at 1.69 and the mine average at 1.22 (Ex. P19-22).

Wednesday, September 1, 1982: On this date the timecards and the testimony reflects that Young and McCleary each spent five hours in the N700W area of the Calliham. At 12:51 on that date the sample in the N700W area was 48.63 WL. It was further noted on the sample sheet that the activities consisted of "removing pipe." Further, radon respirators were used (Ex. P19-23). Five samples were taken by the radon technician and he assigned a "north average" of 12.70 and a mine average of 10.16 WL.

Patti Ann Mine

Thursday, June 17, 1982: On this date Young and McCleary each spent two hours in the Patti Ann mine. On the same day four measurements were taken at different locations in the mine. The recorded exposures ranged from .01 WL to 6.98 WL. A mine average of 2.71 WL was assigned to the mine (Ex. P10-31, P11-28, P21-5).

Friday, June 18, 1982: On this date Young spent four hours and McCleary five hours in the Patti Ann. No measurements were taken for this date. The exposures calculations, appearing on the timecards, are based on the mine average of the 2.71 WL.

Monday, June 21, 1982: On this date Young and McCleary each worked four hours in the Patti Ann. On that date three samples were taken. Exposures ranged from .17 WL to 5.71 WL. After the entry of the lower figure the following notation appears: "Removing cable." An average of 2.36 was assigned for that date (Ex. P21-6).

As previously discussed a "mine average" is generally insufficient to support a violation of this regulation. Specifically, it is incumbent on the Secretary to show that the miners were in a particular area where the radon concentration was exceeded. This is so because radon daughter concentrations can vary greatly in any mine. It is not within the intent of the regulations to impose stringent conditions when no hazard exists. We will accordingly analyze each date in issue here.

Calliham Mine

January 19, 1982: The facts recited above establish a prima facie violation of the regulation. Two miners were in the east haulage area and exposed above 1 WL.

Respondent argues that the single high reading on this date (2.87 WL) was caused by the fans not operating. Further, he testified the men were not in this area when he sampled. He, in fact, assigned a value .03 on the radon cards (Tr. 125-126; Ex. P19-1).

On this issue I find Crowson to be a credible witness. It accordingly follows that the Secretary failed to prove Young and

McCleary were exposed on this date. In addition, I further note that the miners were each in east haulage for only one hour on the contested date.

The allegations of the violation on January 19, 1982 should be vacated.

August 5, 1982: The violation was not proven. The location of the miners within the mine was not established. They could have been in the east haulage "by 1990" or in the east haulage. The respective concentrations there were 1.05 WL and .13 WL.

The Secretary's proof is insufficient in that he failed to establish the location of the miners in the mine on this date. The allegations of a violation on August 5, 1982 should be vacated.

August 19, 1982: The allegations concerning this incident should be vacated because the Secretary failed to prove the radon concentrations to which the miners were exposed.

September 1, 1982: The evidence here establishes a prima facie violation of the regulation. Respondent's brief also states that "clearly there was an exposure in excess of 1.0 WL" (Brief, page 52).

The allegations concerning the violation on September 1, 1982 should be affirmed.

Patti Ann Mine

Thursday, June 17, 1982: For the reasons stated above the Secretary has failed to establish a violation of the regulation. This portion of the citation should be vacated.

Friday, June 18, 1982: The allegations concerning this date should be vacated. As previously stated, generally a "mine average" cannot support a violation of this regulation.

Monday, June 21, 1982: For the reasons stated above, the Secretary failed to prove the allegations concerning the exposures of June 21, 1982. Such allegations should be vacated.

Citation 2084513

This citation alleges a violation of 30 C.F.R. 57.5-40.

Respondent's motion to withdraw its notice of contest as to this citation was granted (Tr. 449, 450). Accordingly, the citation and the proposed penalty of $20.00 should be affirmed.

Citation 2084514

This citation alleges a violation of Section 109(a) of the Act, which provides:

Posting of Orders and Decisions

> Sec. 109(a) At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

The Secretary's proof of the violation alleged here consisted of the admission by respondent in its answer to the complaint. The answer states that "[b]ecause of a good faith disagreement between the inspector and Atlas with regard to the location of the mine office, the posting was not accomplished until two days after the citations were issued" (Tr. 451, Respondent's Answer, Eighth Defense, page 6, paragraph 2). The answer was filed with the Commission on August 26, 1983.

During the hearing the parties agreed that respondent's evidence could not be presented out of turn. Accordingly, the respondent's evidence was heard before the Secretary's evidence (Tr. 211-223). For his proof of a violation the Secretary offered only respondent's admission in its answer.

After the Secretary rested his case as to this citation, respondent moved to withdraw its answer (Tr. 455). The judge denied the motion on the basis that it was untimely (Tr. 455). Respondent further moved to amend its answer to conform to the evidence. This motion was taken as submitted with the case (Tr. 452).

Respondent's evidence relating to this citation follows: Tom Richards, an Atlas safety engineer, testified that citations were given to the company on January 27 (Tr. 211-223). The meeting was at the company's Far West office or the Mill (Tr. 213).

The company wanted the citations posted at the Calliham mine, since it was there that the alleged violative conditions had occurred (Tr. 213). After checking with counsel the

citations were posted at the Calliham mine the day after they were issued (Tr. 214, 216). At that time the Calliham mine, some 55 miles from the office, had been completely shot down. There were no miners at that location (Tr. 216-219).

MSHA inspector Ben Johnson wanted the citations posted at the Far West office (Footnote.4) (Tr. 213).

The citation in contest here was subsequently issued to respondent for failure to post Citation 2084514 which is the citation in WEST 83-87-M. The citation was abated by posting the citations at the mill office. None of the citations concerned the mill office which is 45 miles from the Velvet mine (Tr. 214, 215).

Richards was not aware of the Atlas answer filed in the case stating that the citations were posted two days after they were issued. At the times these citations were issued only the Velvet mine and the mill office, about 45 to 50 miles apart, were in operation. If you wanted to convey information to miners you would post the information at either of those locations (Tr. 220). A few miners had gone from the Calliham mine to the Velvet mine (Tr. 219, 220).

Richards had been told by Tom Wilson that he had taken the citations to Kenny Partridge for him to post them (Tr. 221-223).

Discussion

On the merits of the evidence concerning this citation respondent cannot prevail. The defense shows, at best, that the citations were posted at the Calliham mine office. But there were no miners present at that location nor was there any activity at that mine.

The good faith disagreement referred to in respondent's answer is no doubt the disagreement over whether the posting should be at the Calliham or the mill or the Velvet.

In order that this issue may be reviewed, respondent's motion to amend its answer to conform to the evidence is granted. On the complete record I conclude that respondent violated Section 109(a) of the Act. Posting a citation at a mine where no miners are located does not comply with the Act.

Citation 2084514 should be affirmed.

Does the record support the proposition that the violations should be classified as S & S?

Respondent contends that the testimony of Dr. Archer shows that the radon exposures to Young and McCleary were not likely to result in an illness. Therefore, it is argued that the citations cannot be "S & S".

This position lacks merit. The nature of the injury has already been discussed. Simply restated, the Secretary is not required to identify the particular individual in the class who might incur lung cancer from radiation exposure. National Gypsum Company, 3 FMSHRC 822 (April 1981), cited by respondent, is not inopposite.

Multiple Violations Were Alleged Arising From A Single Series of Events

Respondent states that the citations here allege violations that arose from the same sequence of events and a number of them allege the same hazard. Respondent urges this is improper. Further, such a procedure penalizes it more than once for the same event and hazard.

Respondent's arguments are rejected. On these points the Commission case law holds directly contrary to such a view. Southern Ohio Coal Company, 4 FMSHRC 1459 (August, 1982); Crawford County Mining, Inc., 3 FMSHRC 1211 (May, 1981); Quarto Mining Company, 4 FMSHRC 931 (May, 1982).

Evidentiary Ruling

The Secretary at the hearing entered various objections to Exhibit R3, a transcription of a meeting on November 23, 1982 between Young, McCleary, and two MSHA officials.

An issue arises as to whether the exhibit was properly admissible under the Federal Rules of Evidence. But the Commission has ruled that hearsay evidence is admissible in proceedings before the Commission as long as it is material and relevant. Kenny Richardson, 3 FMSHRC 8, 12n. 7, aff'd, 689 F.2d 632 (6th Cir.1982), cert denied --- U.S. 77 L.Ed2d 299 (1983), Mid-Continent Resources, Inc., 5 FMSHRC 261 (1983).

Exhibit R3 was properly received in evidence.

Civil Penalties

Procedural History

On July 18, 1983 the Secretary filed a Petition for Assessment of Civil Penalty. Respondent's answer was filed on August 25, 1983.

On March 9, 1983, the Secretary filed an Amended Proposal for Penalty asking that Citation 2084508 be designated as a 104(d)(1) citation and that the proposed penalties be raised as follows:

Citation No.	30 C.F.R.	Original Assessment	Proposed Penalty
2084505	57.5-46	$500.00	$6,500.00
2084506	57.5-38	500.00	9,000.00
2084507	57.5-37	98.00	1,500.00
2084508	57.5-34	98.00	9,000.00
2084509	57.5-45	98.00	1,500.00
2084510	57.5-44	98.00	4,000.00
2084511	57.5-3	98.00	4,000.00
2084513	57.5-40	20.00	20.00
2084514	109A	20.00	20.00

On March 28, 1984, respondent filed its opposition to the Secretary's Amended Proposal for Penalty.

After considering the briefs filed by the parties the judge granted the Secretary's motion to amend. Sellerburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147, (1984); El Paso Rock Quarries, 3 FMSHRC 35, 38 (1981); Consolidation Coal Company, 2 FMSHRC 3 (1980); Judge's Order, April 11, 1984.

Having resolved the propriety of the Secretary's motion to amend, we will turn to the assessment of civil penalties.

The mandate to assess civil penalties is contained in Section 110(i) [now 30 U.S.C. 820(i)] of the Act. It provides:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

We will initially consider the three broad statutory categories of good faith, history, size and ability to continue in business. The evidence in these areas is generally uncontroverted. An extensive computer printout (Ex. P33) shows respondent's inspections and violations. The printout begins with violations in January, 1972. But since the Secretary's evidence generally encompasses only the two years before any contested inspection the evidence considered is limited to the same time frame and the mines involved in these cases.

Mine Inspected	Number of Violations
Rim	4
Snow Shaft)	11
Emery County)	
Calliham	0
Dunn	0
Pandora	14
Patti Ann	0
Probe	3
Velvet	15
Sage	0

(Ex. P33)

The foregoing evidence indicates respondent's prior history is not high particularly in view of the number of mines at this site.

Respondent's size and ability to continue in business is reflected in part in its annual report to its shareholders (Ex. P6). It is indicated that in 1983, the year the citations were issued, the company had assets of $118,569,000 and revenues of $94,066,000. Further, the company's net worth was $89,238,000 or $30.15 per share (Ex. P6, 1983 report).

The company's asset, revenue and net worth positions indicate the operator's size is substantial and even the imposition of the full penalties sought by the Secretary in the Amended Proposal for Penalty should not affect the operator's ability to continue in business.

The evidence concerning the gravity focuses on the testimony of Victor E. Archer, M.D., as set forth in the summary of the evidence. Dr. Archer's uncontroverted testimony establishes the hazards to miners when they are exposed to radon daughters.

Atlas asserts that Dr. Archer's testimony was generally irrelevant because there was no testimony that McCleary and Young experienced any actual harm or risk of harm as a result of the alleged violations.

It is true that Dr. Archer did not specifically identify Young or McCleary or any other miner who might be harmed by the radon daughter exposures. But it is not a necessity that specific injury must be shown to an identified miner before a violation exists. If this was a safety violation, for example, involving loose ground, the Secretary would not be required to show that miner X or Y was subject to the hazard. Dr. Archer's testimony addresses the potential injury here on the basis of the miners constituting a class of persons. There is no question but that an injury will occur to some members of the class.

The statutory good faith of respondent is noted in the record. The company rapidly abated the defective condition when it was notified of a violation.

The principal dispute concerning the assessment of civil penalties centers on the evaluation of the company's negligence.

The various citations are hereafter considered individually in conjunction with the various issues.

Citation 2084505

This citation involves the failure of Atlas to furnish proper respirators to its miners.

The Secretary seeks a penalty of $6,500.

Atlas claims (Brief, pages 7-13) that its miners were not exposed as the Secretary claims. In addition, any high levels of radon concentration were unforeseeable. Hence, it argues that no amount exceeding the original assessment would be appropriate.

I reject Atlas' views. The facts set forth above concerning this citation indicate the company's negligence was substantial. Proper respiratory protection was not in use in three instances as noted in the evidence.

The defense that the instances of exposures above 10 WLs were unexpected and unforeseeable cannot be sustained.

It is a well established case law that the Act imposes absolute liability without regard to fault. El Paso Quarries, Inc., supra.

Considering the statutory criteria a civil penalty of $5,000 is appropriate.

Citation 2084506

In connection with this violation the Secretary seeks a civil penalty of $9,000. Respondent violated the regulation in permitting Young and McCleary to receive an exposure in excess of 4 WLM in a single calendar year.

Respondent states (Brief, page 27) that the proposed penalty is excessive in that the overexposure was the result of a single event occurring on September 1. In addition, the two experienced miners, ignoring their common sense, went into an area they knew was not ventilated.

I find these views are without merit. The exposure of September 1 was certainly substantial. But it was only a part

of the total accumulation for that year. Contrary to the arguments, I consider the gravity and negligence to be high for this violation.

A penalty of $7,500 is appropriate.

Citation 2084507

This citation concerns the failure of the operator to sample active working areas when concentrations were above a .30 WL.

Respondent asserts that both the assessed penalty of $98 and the amended proposal of $1,500 is not justified because there was no proof that miners were overexposed. Further, respondent asserts it was acting reasonably in that it was monitoring the various inactive mines.

The detailed evidence concerning this citation establishes a set of facts contrary to respondent's assertions. As noted in the record the miners were overexposed and respondent's sampling activities in the Sage, Rim, Patti Ann, Small Fry and Calliham mines were not exceptional.

A civil penalty of $1,200 is appropriate.

Citation 2084508

This citation involves the radon daughter concentration of 48.63 WL's on September 1, 1982.

The Secretary in his amended proposal seeks a civil penalty of $9,000 for this violation.

In the previous evaluation of this citation it was concluded that the evidence failed to establish a finding of unwarrantable failure.

Nevertheless, the negligence is particularly high since after the two men had worked four hours in this high concentration, they were not told to get appropriate respirator protection. In fact, they reentered the mine and reamined underground for an additional hour.

I deem that a civil penalty of $5,000 is appropriate.

Citation 2084509

This citation addresses the failure of respondent to post certain mines.

Respondent's post trial brief in the main attacks the testimony of witness Young. It is asserted that Young's testimony at the hearing directly conflicted with his prior statements to MSHA that signs were posted.

Young's testimony on direct examination was precise on this issue (Tr. 427-429). On the other hand, Young's statements to MSHA (Ex. R3, pages 8, 12-14, 22-24) do not clearly impeach the direct testimony. I believe the confusion in the record arises due to the fact that at some point in time the area was in fact posted. But the evidence is clear the area was not posted at the times of the alleged violations.

Considering all of the statutory criteria I believe that a civil penalty of $500 is appropriate.

Citation 2084510

This citation involves the failure of respondent to issue respirators in work areas above 1.0 WL during the first five months of 1982. Further, the workers were not trained in the use of such equipment.

The Secretary in his amended proposal seeks a civil penalty of $4,000 for this violation.

Respondent asserts that the exposures here were insignificant in view of the low radon levels in its mines. In fact, respondent claims that the Secretary failed to show any significant overexposures except in the section 10 drift of the Sage mine (Ex. page 8).

The evidence does not support respondent's position. The overexposures were relatively high.

On balance, I believe a civil penalty of $3,000 is appropriate for this citation.

Citation 2084511

The Secretary in his amended proposal seeks $4,000 for this violation.

As previously stated in reviewing this citation, the Secretary proved only the violation of the 48.6 WL concentration that occurred on September 1, 1982. The balance of the allegations were vacated. The negligence factor should be reduced.

Respondent's post-trial brief contends the overexposure on September 1 was the result of a single fan not being turned on and as a result of Young and McCleary willfully going into an area they knew was not fully ventilated.

These same contentions were previously found to be without merit. The same ruling applies.

Considering the statutory criteria I deem that a civil penalty of $500 is appropriate.

Citation 2084513

The Secretary seeks a minimal $20 penalty for the violation of 30 C.F.R. 57.5-40. The proposal appears to be in order and it should be affirmed.

Citation 2084514

The Secretary seeks a minimal penalty of $20 for this posting violation. That amount is appropriate and it should be affirmed.

Briefs

The Solicitor and respondent's counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent that they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide these cases.

2. Violations of the mandatory standards in contest here occurred as is set forth in the order of this decision.

3. For each such violation a civil penalty is assessed as provided in the order.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

In WEST 83-105-M:

1. Citation 2084505 is affirmed and a civil penalty of $5,000 is assessed.

The allegations relating to the unwarrantable failure of respondent to comply with the regulation are affirmed.

~816

2. Citation 2084506 is affirmed and acivil penalty of $7,500 is assessed.

The allegations relating to the unwarrantable failure of respondent to comply with the regulation are affirmed.

In WEST 83-87-M:

3. Citation 2084507 is affirmed and a civil penalty of $1,200 is assessed.

4. Citation 2084508 is affirmed and a penalty of $5,000 is assessed.

The allegations relating to the unwarrantable failure of respondent to comply with the regulation are stricken.

5. Citation 2084509 is affirmed and a penalty of $500 is assessed.

6. Citation 2084510 as it relates to alleged violations during the weeks ending January 16, 1982 and March 27, 1982 is affirmed.

A civil penalty of $3,000 is assessed for the foregoing violations.

Citation 2084510, as it relates to an alleged violation during the week ending March 20, 1982, is vacated. All proposed penalties therefor are vacated.

7. Citation 2084511 as it relates to the incident that occurred on September 1, 1982 is affirmed.

A civil penalty of $500 is assessed for the foregoing violation.

Citation 2084511 as it relates to all other incidents that occurred in the Calliham and Patti Ann mines together with all proposed penalties therefor are vacated.

8. Citation 2084513 is affirmed and a civil penalty of $20 is assessed.

9. Citation 2084514 is affirmed and a civil penalty of $20 is assessed.

John J. Morris
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 At times the radon cards will indicate a week ending on a Friday; at other times it is on a Saturday.

~Footnote_two

2 To calculate the radon daughter concentration from the working level you divide the working level by the number of hours spent in the area. For example, a .15 WL divided by five hours results in a .03 working level concentration (Tr. 117).

~Footnote_three

3 The sample the following day showed a .03 WL concentration (Ex. P19-2).

~Footnote_four

4 Richards testified that the inspector wanted the citations posted at the Far West office; at other times he indicated the inspector wanted them posted at the Velvet mine (Tr. 218).

Appendix A

SAGE MINE

~819

RIM MINE

~820

RIM MINE

~821

PATTI ANN AND SMALL FRY MINES

~822

CHLLIHAM MINE

~823

CHLLIHAM MINE

~824

CHLLIHAM MINE

~825

CHLLIHAM MINE